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Joachim Berc

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EXAMINER

SPAHN, GAY

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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/520,051	<b>Applicant(s)</b> BERC, JOACHIM	
	<b>Examiner</b> Gay Ann Spahn	<b>Art Unit</b> 3635	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 06 March 2009.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 2,4-10,18 and 19 is/are pending in the application.
- 4a) Of the above claim(s) 4,6,7,9 and 10 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 5,8,18 and 19 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                     | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 06 March 2009 has been entered.

### ***Information Disclosure Statement***

The examiner notes that Applicant has filed a copy of the Information Disclosure Statement or IDS letter that accompanied the Information Disclosure Statement or IDS or 1449 filed on 06 August 2008. In the Remarks section of the "Response to Final Office Action" filed 06 March 2009, Applicant argues as follows:

Referring to the Office Action, on page 3, the Examiner indicates that the "AP" item listed on the Information Disclosure Statement submitted on August 4, 2008 has not been considered, since the "AP" item was not indicated as being from a counterpart foreign application. A copy of the cover page of the Information Disclosure Statement in question is attached hereto. In this regard, the cover page includes the following paragraph, "I hereby certify that each item of information contained in Form PTO-1449 accompanying this paper was cited in a communication from a foreign patent office in a counterpart foreign application not more than three months prior to the filing of this statement." Since the "AP" item was submitted in compliance with 37 CFR 1.97, it is requested that the Examiner acknowledge consideration of item "AP" in the next written communication.

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While the examiner agrees that Applicant has certified that "each item of information contained in Form PTO-1449 accompanying this paper was cited in a communication from a foreign patent office in a counterpart foreign application not more than three months prior to the filing of this statement" in the IDS letter, Applicant has failed to list the Japanese counterpart application serial number on the IDS or 1449. The examiner must be able to independently verify that item AP (i.e., "Translation of Japanese Office Action dated June 3, 2008 (9 pages)") listed in the "Non Patent Documents" section of the IDS filed 06 August 2008 is actually from a counterpart foreign application so Applicant must at least list the pertinent Japanese counterpart application's information including serial number and filing date on the 1449.

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

**Claims 18, 19, 5, and 8 are rejected under 35 U.S.C. 102(b) as being anticipated by LEE (U.S. Patent No. 4,861,024).**

**As to claim 18, LEE discloses a longitudinally elongate supporting device for a person's back and head area, said device comprising:**

a head support section (portion of 23 in Fig. 2 to left of portion that cut-outs 31, 33 are in) defining a flat head support surface (flat surface of portion of 23 of Fig. 2 to left of portion that cut-outs 31 and 33 are in); and

a back support section (portion of 23 in Fig. 2 between cut-outs 31, 33 and to the right of portion that cut-outs 31, 33 are in), said back support section (portion of 23 in Fig. 2 between cut-outs 31, 33 and to the right of portion that cut-outs 31, 33 are in) defining a first flat support surface (surface of portion of 23 that cut-outs 31, 33 are in) disposed at the level of shoulder blade areas of a person, and a second flat support surface (surface of portion of 23 to right of portion that cut-outs 31, 33 are in),

said first support surface (surface of portion of 23 that cut-outs 31, 33 are in) being disposed between said head support surface and said second support surface,

said head support surface and said first and second support surfaces all lying within a common horizontal plane,

said first and second support surfaces (surface of portion of 23 that cut-outs 31, 33 are in, and surface of portion of 23 to right of portion that cut-outs 31, 33 are in) each having a width dimension defined transversely relative to a longitudinal central axis of said supporting device and said second support surface (surface of portion of 23 to right of portion that cut-outs 31, 33 are in) having a longitudinal dimension defined parallel to the central longitudinal axis of said supporting device,

said first support surface (surface of portion of 23 that cut-outs 31, 33 are in) defining a pair of areas (areas adjacent cut-outs 31, 33) which open sidewardly outwardly on opposite sides of said back support section (portion of 23 in Fig. 2

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between cut-outs 31, 33 and to the right of portion that cut-outs 31, 33 are in) “for receiving the respective shoulder blade areas of the person” (the structure of LEE is capable of performing the recited intended use within quotation marks),

each said area (areas adjacent cut-outs 31, 33) having an innermost edge defined by an outer longitudinal edge of said first support surface (surface of portion of 23 that cut-outs 31, 33 are in) and located adjacent the central longitudinal axis,

said width dimension of said first support surface (surface of portion of 23 that cut-outs 31, 33 are in) being defined transversely between said innermost edges of said areas (areas adjacent cut-outs 31, 33) and being significantly less than said width dimension of said second support surface (surface of portion of 23 to right of portion that cut-outs 31, 33 are in),

said width dimension of said first support surface (surface of portion of 23 that cut-outs 31, 33 are in) being sufficiently narrow so that said first support surface (surface of portion of 23 that cut-outs 31, 33 are in) supports substantially only a spinal column region of the person and said areas being unobstructed sidewardly outwardly in a direction away from the central axis and being unobstructed downwardly in a direction transverse to the common plane “to permit the respective shoulder blade areas of the arms of the person in respective sidewardly outwardly extended positions generally parallel to the common plane to move downwardly below the common plane without meeting any substantial resistance from said supporting device” (the structure of LEE is capable of performing the recited intended use within quotation marks),

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said width dimension of said second support surface (surface of portion of 23 to right of portion that cut-outs 31, 33 are in), longitudinally between a location on said second support surface corresponding axially to a hip area of a person and a location on said second support surface immediately axially adjacent the respective said areas in which the shoulder blade areas are positioned, being of a dimension sufficient for fully supporting the width of a person's thoracic region while lying on the back,

said areas (areas adjacent cut-outs 31, 33) each having a maximum width dimension extending transversely between the respective said innermost edge to an outer extent in longitudinal alignment with an outer longitudinal edge of said second support surface (surface of portion of 23 to right of portion that cut-outs 31, 33 are in),

said width dimension of each said area (areas adjacent cut-outs 31, 33) being greater than said width dimension of said first support surface (surface of portion of 23 that cut-outs 31, 33 are in).

**As to claim 19,** LEE discloses the device of claim 18 as discussed above, and LEE also discloses that said head support section has a width dimension defined transversely relative to the longitudinal central axis of said supporting device, said width dimension of said head support section being greater than said width dimension of said first support surface.

**As to claim 5,** LEE discloses the device of claim 18 as discussed above, and LEE also discloses that said back support section and said head support section are integrated in a rigid support unit.

**As to claim 8, LEE** discloses the device of claim 18 as discussed above, and LEE also discloses that the device is provided to a home or workplace furniture item or leisure item.

**Claims 18, 5, and 8 are rejected under 35 U.S.C. 102(b) as being anticipated by FALBO, SR. ET AL. (U.S. Patent Application Publication No. 2002/0056160).**

**As to claim 18, FALBO, SR. ET AL.** disclose a longitudinally elongate supporting device for a person's back and head area, said device comprising:

a head support section (28) defining a flat head support surface (surface of 28);  
and

a back support section (52, 58), said back support section (52, 58) defining a first flat support surface (surface of 52) disposed at the level of shoulder blade areas of a person, and a second flat support surface (surface of 58),

said first support surface (surface of 52) being disposed between said head support surface (surface of 28) and said second support surface (surface of 58),

said head support surface (surface of 28) and said first and second support surfaces (surfaces of 52, 58) all lying within a common horizontal plane,

said first and second support surfaces (surface of 52, 58) each having a width dimension defined transversely relative to a longitudinal central axis of said supporting device and said second support surface (surface of 58) having a longitudinal dimension defined parallel to the central longitudinal axis of said supporting device,



said first support surface (surface of 52) defining a pair of areas (60, and what 20 is in in Fig. 2) which open sidewardly outwardly on opposite sides of said back support section (52, 58) “for receiving the respective shoulder blade areas of the person” (the structure of FALBO, SR. ET AL. is capable of performing the recited intended use within quotation marks),

each said area (60, and what 20 is in in Fig. 2) having an innermost edge defined by an outer longitudinal edge of said first support surface (surface of 52) and located adjacent the central longitudinal axis,

said width dimension of said first support surface (surface of 52) being defined transversely between said innermost edges of said areas (60, and what 20 is in in Fig. 2) and being significantly less than said width dimension of said second support surface (surface of 58),

said width dimension of said first support surface (surface of 52) being sufficiently narrow so that said first support surface (surface of 52) supports substantially only a spinal column region of the person and said areas being unobstructed sidewardly outwardly in a direction away from the central axis and being unobstructed downwardly in a direction transverse to the common plane “to permit the respective shoulder blade areas and the arms of the person in respective sidewardly outwardly extended positions generally parallel to the common plane to move downwardly below the common plane without meeting any substantial resistance from said supporting device” (the structure of FALBO, SR. ET AL. is capable of performing the recited intended use within quotation marks),

said width dimension of said second support surface (surface of 58), longitudinally between a location on said second support surface corresponding axially to a hip area of a person and a location on said second support surface immediately axially adjacent the respective said areas in which the shoulder blade areas are positioned, being of a dimension sufficient for fully supporting the width of a person's thoracic region while lying on the back,

said areas (60, and what 20 is in in Fig. 2) each having a maximum width dimension extending transversely between the respective said innermost edge to an outer extent in longitudinal alignment with an outer longitudinal edge of said second support surface (surface of 58),

said width dimension of each said area (60, and what 20 is in in Fig. 2) being greater than said width dimension of said first support surface (surface of 52).

**As to claim 5, FALBO, SR. ET AL.** disclose the device of claim 18 as discussed above, and FALBO, SR. ET AL. also disclose that said back support section (surfaces of 52, 58) and said head support section (28) are integrated in a rigid support unit.

**As to claim 8, FALBO, SR. ET AL.** disclose the device of claim 18 as discussed above, and FALBO, SR. ET AL. also disclose that the device is provided to a home or workplace furniture item or leisure item.

### ***Response to Arguments***

Applicant's arguments filed 06 March 2009 have been fully considered but they are not persuasive.

On page 8, lines 20-24, of the Remarks section of the "Response to Final Office Action" filed 06 March 2009, Applicant argues with respect to LEE's device that "the cutouts 31 and 32 are obstructed sidewardly outwardly by the respective support stands 14 which are located on opposite sides of the frame 12, and are obstructed in a direction downwardly by the lower portions 21 of the support stands 14." The examiner disagrees. The downward view of Fig. 2 of LEE shows that there is plenty of room between the cut-outs 31 and 33 and the barbell support stands 14 for the shoulder blades and upper arms of the user to traverse in a unobstructed manner. Further, the user may be a child or midget with very short arms so that clearly there is enough room for unobstructed movement. In response to Applicant's comment at lines 25-27 of page 8 of the Remarks section that the cut-outs are obstructed by the rectangular pad, the examiner is applying the embodiment of LEE wherein the pad member has the same shape as the solid member 30 as noted by Applicant on page 8, lines 8-9 of the Remarks section so that there is no obstruction by the pad.

Finally, in response to Applicant's arguments on page 8, line 31 through page 9, line 3, that a generally narrow bench is not feasible because it would be too narrow for stability with extremely heavy weights, the examiner notes that only a minority of users would want to be able to use the bench with extremely heavy weights so it would be perfectly reasonable to produce the narrow bench this would be sufficient for the vast majority of users.

With respect to page 9, lines 4-16, of the Remarks section, the examiner notes that "comments complied by the inventor" are referred to. First, the examiner notes that

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the "comments" are not in affidavit or declaration form. Second, the "comments" refer to the 'rejections" and since the inventor is not an expert in patent law and has a pecuniary interest in having the present application issue as a patent, his comments, while considered, are not persuasive.

Based on the foregoing, the 35 U.S.C. 102(b) rejection of claims 18, 19, 5 and 8 as being anticipated by LEE are being maintained.

On page 8, lines 20-24, of the Remarks section of the "Response to Final Office Action" filed 06 March 2009, Applicant argues with respect to FALBO, SR. ET AL.'s device fails to disclose that "said width dimension of said second support surface, longitudinally between a location on said second support surface corresponding axially to a hip area of a person and a location on said second support surface immediately axially adjacent the respective said areas in which the shoulder blade areas are positioned, being of a dimension sufficient for fully supporting the width of a person's thoracic region while lying on the back." The examiner disagrees because it is not known whether the "person" is an infant, small child, or 7 foot 3 inch basketball player. Indeed, if 7 foot 3 inch Kareem Abdul Jabbar were the "person" lying on the device of FALBO, SR. ET AL. then perhaps his thoracic region would be fully supported by the portion of the device below 58. Further, FALBO, SR. ET AL. gives no dimensions for his device and the "patient" 32 shown in Fig. 1 may be an extremely small patient. Further, it is of no consequence what the device of FALBO, SR. ET AL. is intended to accomplish as long as it meets the words of the claim, which it is the examiner's position it does, it is an anticipatory reference.

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With respect to Applicant's arguments on the top of page 11 that FALBO, SR. ET AL. has the mammography device 36 in Figs. 1 and 2 positioned in the access cites created when one of the filler sections 18, 22 is folded down and therefore is not unobstructed, the examiner disagrees and notes that when as shown in Figs. 3 and 5 there is no mammography device positioned in the access cites, the areas are unobstructed and the person lying thereon can extend his or her arms outwardly and downwardly without obstruction and thus the claim language is met. The examiner disagrees that the width of the spine section 52 of FALBO, SR. ET AL. is too large to allow unobstructed movement. Again, FALBO, SR. ET AL. gives no dimension and for a large person arm movement would be unobstructed.

Based on the foregoing, the 35 U.S.C. 102(b) rejection of claims 18, 5, and 8 as being anticipated by FALBO, SR. ET AL. are being maintained.

### ***Conclusion***

All claims are drawn to the same invention claimed in the application prior to the entry of the submission under 37 CFR 1.114 and could have been finally rejected on the grounds and art of record in the next Office action if they had been entered in the application prior to entry under 37 CFR 1.114. Accordingly, **THIS ACTION IS MADE FINAL** even though it is a first action after the filing of a request for continued examination and the submission under 37 CFR 1.114. See MPEP § 706.07(b). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

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A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Gay Ann Spahn whose telephone number is (571)-272-7731. The examiner can normally be reached on Monday through Friday, 9:00 am to 5:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Richard E. Chilcot can be reached on (571)-272-6777. The fax phone number for the organization where this application or proceeding is assigned is (571)-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Gay Ann Spahn/  
Gay Ann Spahn, Primary Examiner  
March 29, 2009